DIRECTOR OF FOREST SARAWAK & ORS v. NICHOLAS MUJAH ASON & ORS

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN TUAN MAT JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: Q-01-301-2011]
23 MARCH 2018

LAND LAW: *Native customary right – Claim for – Claim for native customary right over area of land – Whether logging activities by timber companies legal – Whether there was encroachment and trespass – Whether construction of rail line caused damage to environment – Whether affected claimants' livelihood – Whether there was delay in commencing action – Whether claimant successfully established native customary rights over area of land*

LAND LAW: *Trespass – Allegation of – Claim for native customary right over area of land – Whether logging activities by timber companies legal – Whether there was encroachment and trespass – Whether construction of rail line caused damage to environment – Whether affected claimants' livelihood – Whether claimant successfully proved case of trespass*

The respondents ('the plaintiffs'), who were of Iban race from three different villages in Simunjan, commenced an action at the High Court, for themselves and other villagers, for a declaration that they had native customary rights ('NCR') over an area of land. According to the plaintiffs, (i) the first and second defendants' ('the timber companies') logging activities had illegally encroached into their communal land, the Bukit Bediri and Stika Forest Reserves; (ii) the rail line built by the timber companies over the said area had caused serious damage to its environment, leading to the loss of its timber, polluting its river system and causing serious damage to the plaintiffs' livelihood. The timber companies argued that (i) since the timber licence was issued way back in 1966, there was an inordinate and inexcusable delay on the part of the plaintiffs in filing the action; and (ii) only the Ibans or Sea Dayaks under Penghulu Berong were entitled to the rights and privileges over the Bukit Bediri Forest Reserve and even so, these rights and privileges were subject to the control of the first appellant. The first to third appellants ('the State Government') denied that there was such a communal reserved land. Allowing the claim, the High Court declared that (i) the plaintiffs had NCR over the said area; and (ii) the construction of a rail line on the two forests constituted an encroachment and trespass of the land within the two forests. Hence, the present appeal by the State Government. The issues that arose were (i) whether the declaration granted by the High Court Judge ('the HCJ') was correct; and (ii) whether the plaintiffs successfully established a case of trespass.

Held (dismissing appeal; affirming order of High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The Second Schedule of Gazette Notification No. 760 ('the Second Schedule') expressly states that the forest reserve is constituted for the benefit of the permanent inhabitants of the seven longhouses. In addition, 20 persons are listed as persons that shall have the right to retain possession of rubber and pepper gardens planted prior to the constitution of the forest reserve. The rights, as stated in paras (a), (b) and (c) of the Second Schedule, are generally for the inhabitants to take forest produce, hunt game and catch fish and to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve, respectively. Those rights have been inherited by the plaintiffs. The encroachment and the logging activities of the timber companies have destroyed the plaintiffs' sources of livelihood, the destruction of their rubber gardens, farm land, old settlement sites with orchard gardens, burial grounds, sacred sites and valuable trees. The encroachment and logging activities had also caused erosion to the plaintiffs' land and polluted their rivers. (paras 38-40)

(2) There was no outright rejection of the establishment of the plaintiffs' NRC by foraging for food in the jungle. In any event, paras (a) and (b) of the Second Schedule clearly provide for the plaintiffs to take timber, to hunt game and catch fish in the forest reserve, which was consistent with the plaintiffs' custom of *pulau* and *pemakai menoa*. There was no appealable error on the part of the HCJ in making the first order. (paras 44 & 45)

(3) In respect of trespass or encroachment by the rail line, there was no appealable error on the part of the HCJ in Her Ladyship's finding that the rail line had been built right across Stika Forest and had traversed part of the Bukit Bediri Forest Reserve. Notwithstanding that the rail line was built over swampy lands, the encroachment had interfered with the plaintiffs' livelihood as the plaintiffs could still carry out activities on and derived benefits from the swampy land. Furthermore, apart from the fact that approval was given for the construction of the rail line, there was no other evidence adduced to show that, pursuant to the approval, the first appellant had issued any direction or order that the exercise of the plaintiffs' subsisting rights be limited. (paras 46 & 50)

***Bahasa Malaysia** Headnotes*

Responden-responden ('plaintif-plaintif'), kaum Iban dari tiga kampung berbeza di Simunjan, memulakan satu tindakan di Mahkamah Tinggi, bagi diri mereka dan lain-lain penduduk kampung, memohon satu perisytiharan bahawa mereka mempunyai hak adat anak negeri ('HAAN') atas satu kawasan. Menurut plaintif-plaintif, (i) aktiviti-aktiviti pembalakan oleh

defendan pertama dan kedua ('syarikat-syarikat pembalakan'), secara salah, memasuki tanah komuniti mereka iaitu Hutan Simpan Bukit Bediri dan Stika; dan (ii) landasan kereta api yang dibina oleh syarikat pembalakan, merentasi kawasan tersebut, telah menyebabkan kerosakan serius pada alam sekitar, membawa pada kehilangan balak, mencemarkan sistem sungai dan secara serius menjejaskan mata pencarian plaintif-plaintif. Syarikat pembalakan menghujahkan (i) oleh kerana lesen pembalakan dikeluarkan sejak 1966, terdapat kelewatan oleh plaintif, yang terlampau dan tidak boleh dimaafkan, dalam memfailkan tindakan; dan (ii) hanya Iban atau Dayak Laut bawah Penghulu Berong yang mempunyai hak-hak dan keistimewaan terhadap Hutan Simpan Bukit Bediri dan, walau sedemikian, hak-hak dan keistimewaan ini tertakluk pada kawalan perayu pertama. Perayu pertama hingga ketiga ('Kerajaan Negeri') menafikan bahawa terdapat tanah rizab komuniti seperti yang dinyatakan. Membenarkan tuntutan, Mahkamah Tinggi mengisytiharkan (i) plaintif mempunyai HAAN atas kawasan tersebut; dan (ii) pembinaan landasan kereta api atas dua hutan ini terjumlah sebagai kemasukan salah dan pencerobohan tanah dalam dua hutan tersebut. Maka timbul rayuan ini oleh Kerajaan Negeri. Isu-isu yang timbul adalah (i) sama ada pengisytiharan oleh Hakim Mahkamah Tinggi ('HMT') adalah betul; dan (ii) sama ada plaintif-plaintif berjaya membuktikan satu kes pencerobohan.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi) Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Jadual Kedua Pemberitahuan Warta No. 760 ('Jadual Kedua') dengan jelas menyatakan bahawa hutan simpan tersebut dibentuk bagi manfaat penduduk tetap tujuh rumah panjang. Tambahan itu, 20 orang disenaraikan sebagai orang-orang yang mempunyai hak milikan atas kebun-kebun getah dan lada yang ditanam sebelum pembentukan hutan simpan ini. Hak-hak ini, seperti yang dinyatakan dalam perenggan (a), (b) dan (c) Jadual Kedua, umumnya untuk penduduk-penduduk memungut hasil hutan, berburu dan menangkap ikan dan terus menunaikan hak *temuda* yang masing-masing perolehi sebelum pembentukan hutan simpan. Hak-hak ini diwarisi oleh plaintif-plaintif. Kemasukan salah dan aktiviti-aktiviti oleh syarikat pembalakan memusnahkan sumber-sumber pendapatan plaintif-plaintif, merosakkan kebun getah, tanah kebun, kawasan pendudukan lama dengan dusun, tanah perkuburan, kawasan-kawasan keramat dan pokok-pokok berharga. Kemasukan salah dan aktiviti-aktiviti pembalakan juga telah menyebabkan hakisan tanah plaintif-plaintif dan mencemarkan sungai-sungai mereka.

A **(2)** Tiada penolakan langsung pembentukan HAAN plaintif-plaintif untuk mencari makan di dalam hutan. Dalam apa-apa jua keadaan, perenggan (a) dan (b) Jadual Kedua jelas memperuntukkan plaintif-plaintif mengambil balak, berburu dan menangkap ikan di dalam hutan simpan dan ini selaras dengan adat *pulau* dan *pemakai menoa* plaintif-plaintif.
B Tiada kekhilafan boleh-rayu dalam dapatan HMT yang membuat perintah pertama.

(3) Bagi pencerobohan atau kemasukan salah melalui landasan kereta api, tiada kekhilafan boleh-rayu dalam dapatan HMT bahawa landasan kereta api ini dibina merentangi Hutan Stika dan melintasi sebahagian
C Hutan Simpan Bukit Bediri. Tanpa mengira landasan kereta api ini dibina atas tanah paya, kemasukan salah telah mengganggu sumber pendapatan plaintif-plaintif kerana mereka masih boleh menjalankan aktiviti-aktiviti dan memperoleh manfaat daripada tanah paya tersebut. Tambahan lagi, selain fakta bahawa kebenaran diberi bagi pembinaan
D landasan kereta api, tiada keterangan lain yang menunjukkan, ekoran kebenaran ini, perayu pertama telah mengeluarkan apa-apa arahan atau memerintahkan agar penjalanan hak-hak sedia ada plaintif-plaintif dihadkan.

Case(s) referred to:

E *Bisi Jinggot v. Superintendent of Lands And Surveys Kuching Division & Ors [2013] 6 CLJ 805 FC* ***(refd)***

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC ***(refd)***

Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another
F *Appeal [2005] 3 CLJ 555 CA* ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 103

Forests Ordinance (Sarawak) (Cap 126), ss. 4(1), 40

For the appellants - Mohd Adzrul Adzlan; State Legal Counsel, Sarawak

G *For the respondents - Baru Bian, Simon Siah SY Jen & Chua Kuan Ching; M/s Baru Bian, Advocs*

[Editor's note: For the High Court judgment, please see Nicholas Mujah Ason & Ors v. Hock Tong Hin Sawmill Co Bhd & Ors [2012] 1 CLJ 749 (affirmed).]

H *Reported by Najib Tamby*

JUDGMENT

Tengku Maimun Tuan Mat JCA:

I **[1]** This is an appeal by the appellants/the third to the fifth defendants against the decision of the High Court in entering judgment for the respondents/plaintiffs for, *inter alia*, a declaration that the respondents/

plaintiffs have native customary rights over land in Bukit Bediri Forest Reserve and Stika Forest and that the construction of a rail line over the two forests constituted an encroachment and trespass of the land within the two forests. We heard the appeal on 10 February 2014 and had dismissed the same. We now give our reasons. For convenience, parties will be referred to as they were in the High Court.

Background Facts

[2] The plaintiffs are of Iban race and are from three different villages situated in a small rural town of Simunjan located in the first division, Sarawak.

[3] The plaintiffs brought this action for themselves and on behalf of other villagers from four other villages for a declaration that they have native customary rights over an area located at Stika and Bukit Bediri, Simunjan.

[4] The first defendant, a timber company was issued with a licence to extract merchantable logs from the said area whereas the second defendant is the contractor engaged by the first defendant to do the felling and extraction of the logs. The Director of Forests, Sarawak, the Superintendent of Lands & Surveys, Sarawak and the Government of the State of Sarawak were sued as the third to the fifth defendants respectively.

[5] In their statement of claim, the plaintiffs pleaded that the logging activities of the first and the second defendants had illegally encroached into their communal land, the Bukit Bediri and Stika Forest Reserves. These forest reserves were gazetted in 1959 by the State Government as communal forest *vide* Gazette Notification No. 760.

[6] In particular, the plaintiffs stated that the rail line built by the first and/or the second defendant over the said area had caused serious damage to its environment, leading to the loss of its timber, polluting its river system and thus causing serious damage to the plaintiffs' livelihood.

[7] The plaintiffs took action to complain to the District Officer of Simunjan, and to the Sarawak Forestry Corporation. Police reports were also lodged. The plaintiffs took steps to erect physical blockades at Bukit Bediri on 14 September 2006. These actions by the plaintiffs, however, failed to resolve the dispute. On 4 July 2007, this action was filed wherein the plaintiffs claimed for declaratory reliefs in respect of the plaintiffs' entitlement to the said area, including the constitutionality of the timber licence. The plaintiffs also claimed for aggravated and exemplary damages to be paid for the alleged trespass to their land.

[8] The first and the second defendants ("the timber companies") in their statement of defence pleaded that the timber licence was issued to the first defendant way back in 1966 and that since then, they have been working in the licensed area without interference or complaint by the plaintiffs until the time and events which led to the filing of this action. The timber companies thus contended that there was inordinate and inexcusable delay on the part of the plaintiffs in filing this action.

[9] Relying on Gazette Notification No. 760, the timber companies also pleaded that only the Ibans (or Sea Dayaks) under Penghulu Berong were entitled to the rights and privileges over the Bukit Bediri Forest Reserve and even so, these rights and privileges are subject to the control of the Director of Forests.

[10] The third to the fifth defendants (collectively referred to as "the State Government") denied that there was such a communal reserved land as shown in Map "M" attached to the plaintiffs' statement of claim. The area shaded in Map "M" according to the State Government, is in fact, the Bukit Bediri Forest Reserve of which no native customary rights could be created over it.

[11] The State Government further denied that Gazette Notification No. 760 established both the Bukit Bediri Forest Reserve and Stika Communal Forest as claimed by the plaintiffs. The State Government also denied that the timber licensed area encroached into the Bukit Bediri Forest Reserve. It was pleaded by the State Government that before the timber licence was issued to the first defendant, the licensed area was still primary jungle as shown by aerial photographs taken in 1951, 1954 and 1955. The State Government thus took the position that the plaintiffs have no native customary rights over the said forests. The State Government also contended that there had been inordinate delay on the part of the plaintiffs in bringing this action.

Proceedings In The High Court

[12] Several witnesses gave evidence for the plaintiffs. The learned trial judge heard Nicholas Mujah (PW1) who testified on his villagers' and his inherited rights. Map "M" attached to the statement of claim was drawn by PW1 from the global positioning system (GPS) coordinates taken of the logging activities. The map (exh. P1) shows that the said activities were inside the boundary of the communal forest area which PW1 identified as Stika and Bukit Bediri Forests. PW1 listed seven villages sharing these communal forests.

[13] It was the evidence of PW1 that the encroachment and logging activities of the timber companies have destroyed their sources of livelihood, destroyed their rubber gardens, farmland, *tembawai* (old settlement sites with orchard garden), the valuable merchantable trees such as belian and meranti and had caused erosion to their land and polluted their rivers.

[14] The learned trial judge also heard the testimony of Penghulu Athan ak Asong (PW2) who was about 65 years of age when he gave evidence. PW2 testified that he was a councillor with Simunjan District Council and was the third Penghulu for the villages around the Sebangan River. As Penghulu, PW2 was also a Superior Native Court Judge.

[15] PW2 echoed the evidence of PW1 as to how their grandparents and/or parents had not only cultivated the said area with rubber trees and fruit trees but had also used it for their burial grounds and sacred sites; that their people depend on the two forests as their sources of livelihood, for the fishes, wild games and timber as the surrounding forest have all been cleared for oil palm cultivation. PW2 also testified on the encroachment of their communal forests and the damages suffered by them arising from the illegal logging by the timber companies

[16] Mr Nicholas Bawin ak Anggat (PW3), explained how the Ibans established their native customary rights over the land. He also gave his explanation on the concept of *pemakai menoa, tanah umai, pulau galau, pulau bais, pulau buah and tembawai.* PW3 who held the post of Deputy President of Majlis Adat Istiadat Sarawak from 12 August 1992 until February 2005 is an authority on Iban customs for his evidence has been received by the courts in a number of cases, including in *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769.

[17] For the defendants, evidence was led to establish that there was only Bukit Bediri Forest Reserve which was constituted *vide* the Gazette Notification No. 760. The Gazette Notification published on 3 June 1952 recognised and provided for the rights of seven longhouses and 20 persons. The rights are spelt out as follows:

(a) to take timber, poles, fuel, rattan and other climbers, bamboo, dammar, fruit, honey, beeswax and ataps for their own domestic use and for boat-building but not for sale or batter, provided that the quantity of, and the place and manner of collection of such forest produce shall be subject to the control of the Conservator of Forests; and

(b) to hunt game and catch fish, provided the exercise of this right shall be subject to the provisions of the laws of Sarawak relating to hunting and fishing.

(c) to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve on condition that no more virgin forest is felled.

[18] We do not wish to set out the seven longhouses, suffice to state that PW2 in his evidence was able to identify the longhouse he belonged to from the ones listed in the Schedule. He was also able to connect the villages in this action to the seven longhouses listed in the Schedule. Further, PW2 was able to name the present Tuai Rumah or the longhouse chief in charge of each village, in place of those named in the Gazette Notification No. 760.

Findings Of The High Court

[19] On the strength of the evidence of PW2, which the learned trial judge found not contradicted, Her Ladyship accepted that the plaintiffs and the people they represent from the seven villages named in this action have inherited the benefits spelt in, and from those named in the Gazette Notification No. 760.

[20] The learned judge formed the view that the benefits conferred in Gazette Notification No. 760 are akin to that exercisable by Iban claimants of native customary rights under their concept of *pemakai menoa* and *pulau*. By gazetting the Bukit Bediri Forest Reserve, the learned judge opined that the State Government had recognised that those named therein, and now the plaintiffs after them, have native customary rights over the said forest.

[21] The learned judge further found, from the evidence tendered by the State Government that there was a proposal to constitute a communal forest known as Stika Communal Forest. This proposal was made in 1953. This proposed proclamation also contained a list of longhouses which would benefit from the constitution of this communal forest. The benefits are listed in schedule II which duplicates that of longhouses listed in the Bukit Bediri Forest Reserve's Gazette Notification No. 760. The learned judge was of the view that had the proposed proclamation been gazetted, the plaintiffs' claim for native customary rights to Stika Forest would have been proved.

[22] The learned judge further found that the plaintiffs' allegation of the encroachment by the timber companies by their illegal logging and the building of the rail line were proven through Map "M" which had shown and shaded the areas where the alleged encroachment occurred. This map was challenged by the defendants who questioned PW1, an unregistered land surveyor, on his knowledge and expertise in producing that map.

[23] Although the map was admitted as evidence without objections by the defendants' counsel, the learned judge ruled that very little weight could be attached to it since the maker is not an expert on map drawing. Her Ladyship declined to rely on the map to establish the allegation of encroachment made by the plaintiffs. On the whole, the learned judge found the evidence on the alleged encroachment by the illegal logging to be unsatisfactory and not sufficient to discharge the burden of proving their case under ss. 101 and 103 of the Evidence Act 1950.

[24] Her Ladyship nevertheless found that the encroachment by the construction of the rail line has been more than satisfactorily proven. The finding was based, *inter alia,* on the evidence presented by the State Government in the very maps prepared by the Forest Department and by the Land and Survey Department, Samarahan Division (p. 1 of exh. D2 and p. 2 of exh. D2 respectively). The rail line is clearly shown in these two maps to have been drawn right across the Stika Forest and traversed part of the Bukit Bediri Forest Reserve, to connect the area under the timber licence given to the first defendant which was separated by the two forests. The learned judge found this evidence as the definitive evidence that there was encroachment of the two forest areas and for which restitution must be made to the plaintiffs.

[25] The learned judge's conclusion on the issue of encroachment was also based on the evidence of Mr Tiong Ching Cheong (DW1), the camp manager of the second defendant. DW1 testified that the rail line was built over swampy lands which were prone to flooding and which were not suitable for human settlement, cultivation of crops or planting of fruit trees. Her Ladyship found that since the plaintiffs' claim is not for land which they lived and cultivated on but one which they forage for food, hunt and fish, the swampy land does not render all these impossible because it is common knowledge in Sarawak that certain freshwater fishes such as catfish thrive in swampy land; that the natives eat an endemic plum called "asam payak" which grows only on its soil and that another indigenous plant, the "nibong tree" which grows on swampy land is usually eaten for its shoot and the trunk used as a building material.

[26] Judgment was thus granted by the learned judge to the plaintiffs in the following terms, with costs:

(i) The plaintiffs have inherited native customary rights over the Bukit Bediri Forest Reserve and the Stika Forest, the boundaries of which are as delineated and shown in maps produced by the Forestry Department Sarawak and Land and Survey Department Sarawak appearing at pp. 1 and 2 of exh. D4.

(ii) The construction of the rail line across these two forests constitutes an encroachment and a trespass of the land.

(iii) The defendants are jointly and severally liable to pay damages to be assessed by the Deputy Registrar, to the plaintiffs (except those from Kampung Stika who have been compensated) for the said trespass.

[27] Aggrieved, the State Government appealed to this court.

A **The Appeal**

[28] Learned State Counsel raised two issues before us, namely (i) whether the first order or declaration granted by the learned judge was correct or whether it should be varied and (ii) whether the plaintiffs have established a case of trespass.

B

[29] It was submitted for the State Government that there is no dispute that the areas claimed by the plaintiffs fall within the Bukit Bediri Forest Reserve and the proposed Stika Communal Forest, and that the nature and extent of the rights of the native communities are set out in the Gazette Notification No. 760 and the proclamation for the proposed Stika Communal Reserve.

C

[30] Highlighting paragraphs (a) and (c) of the Second Schedule of Gazette Notification No. 760, learned counsel argued that under para. (a), foraging does not apply and that under paragraph (c), there cannot be any new area cleared by the plaintiffs. The proper order that should have been made by

D the learned judge, according to learned counsel, is that the plaintiffs have such rights in the Bukit Bediri Forest Reserve and in the proposed Stika Communal Forest as are set out in the Gazette Notification No. 760 and in the proclamation for the intended Stika Communal Forest, respectively.

[31] On the issue of trespass, it was argued for the State Government that

E there is no evidence that the rail line traversed any of the *temuda* or the cultivated and cleared areas or had destroyed any vegetation from which the plaintiffs derived their forest produce. It was further argued that the learned judge's finding on the activities or benefits derived by the plaintiffs from the swampy land is not supported by evidence. And even if the rail line was built

F in the area where the plaintiffs forage for food, hunt or fish, which rights are subject to the consent of the Director of Forest, the learned judge made no finding that the rail line had in any way interfered with or affected the plaintiffs' said rights or activities.

[32] Further, by virtue of ss. 4(1) and 40 of the Forests Ordinance Chapter

G 126, forest reserve and communal forest, respectively, are constituted over State Land. Once a forest reserve or a communal reserve is constituted, the native communities whose rights are admitted can only use the forest reserve or the communal forest in accordance with the conditions imposed by the Director of Forests. In the premises, it was the contention of the State

H Government that the decision of the Director of Forests to allow the rail line over the State Land cannot in law be trespass to the land as stated in the second order granted by the learned judge.

[33] In response, learned counsel for the plaintiffs submitted that rights (a) and (b) of the Second Schedule clearly refer to the use or benefits exercisable

I by the longhouses over their *pulau* and *pemakai menoa* respectively. In this regard, learned counsel cited the judgment of the Federal Court in *Bisi Jinggot*

v. Superintendent of Lands and Surveys Kuching Division & Ors [2013] 6 CLJ 805 where His Lordship Richard Malanjum, Chief Judge of Sabah and Sarawak said at p. 828:

> [47] To begin with it may be useful to understand the various terminologies under NCL, namely:
>
> "pemakai menoa" is a term given to an area of land selected by pioneers of a longhouse community who are usually related to each other for the construction of 'a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families'. And the longhouse will 'just expand to with new families'. And it is within the 'pemakai menoa' that the longhouse community will establish 'temuda' which is an area of land accessible for farming and 'pulau' or 'pulau galau' which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce. The other Iban terms are 'tembawai' for old longhouse site; 'tanah umai' for cultivated land within 'pemakai menoa' and 'pendam' is cemetery. However, 'pemakai menoa' has its boundary usually based on streams, watersheds, ridges and permanent landmarks, separating it from another longhouse community" (See: *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and Another Appeal* [2005] 3 CLJ 555; [2006] 1 MLJ 256 (CA)).

[34] And at p. 833, His Lordship the Chief Judge of Sabah and Sarawak stated:

> [64] In respect of the intended purpose, NCL were created and existed by and for the natives in Sarawak. NCL are basically meant:
>
> i. for farming ('temuda/tanah umai') on the land within 'pemakai menoa' that is 'an area of land held by a distinct longhouse or village community, and includes farms, garden, fruit groves, cemetery, water and forest within a defined boundary (garis menoa)';
>
> ii. for fishing in the rivers therein; and
>
> iii. for the gathering of forest product such as bamboo, 'damar' (resin) and timber for building boats and houses from the jungles ('pulau' or 'pulau galau').

[35] Based on the above-quoted judgment coupled with the description of rights (a) and (b) in the Second Schedule, the plaintiffs submitted that there is no doubt that the Gazette Notification No. 760 was referring to the longhouses' rights or benefits exercisable by the Iban plaintiffs over their *pulau* and *pemakai menoa*. Relying on a host of authorities (which we find no necessity to reproduce) which confirmed *temuda, pemakai menoa* and *pulau* as the Iban custom creating native customary rights, learned counsel for the plaintiffs submitted that the learned judge made no error in finding that the Bukit Bediri Forest Reserve and the proposed Stika Forest Reserve expressly or impliedly acknowledged the plaintiffs' native customary rights over the two forests.

[36] The plaintiffs further submitted that the learned judge was likewise correct in her findings of fact in respect of the issue of encroachment by the rail line. Learned counsel argued that the subsisting rights at para. (a) of the Second Schedule provide for generally the taking of jungle produce. In the process of the construction of the rail line, the trees listed under para. (a) would be felled, depriving the plaintiffs, the use of those trees. Further, when the forests are felled, the natural habitat of wild game and fishes are under threat through water pollution from soil erosion; food sources of the animals are cut short and soil dumping would also be another cause for water pollution in the area.

Our Findings

[37] The Gazette Notification No. 760 (record of appeal vol. II: p. 377) reads:

> In exercise of the powers conferred on him by section 12 of the Forests Ordinance, the Chief Secretary hereby constitutes, with effect from 1st June 1952, the land enclosed within the boundaries described in the First Schedule hereto a Forest Reserve subject to the rights conceded and special conditions attached specified in the Second Schedule hereto.

[38] The Second Schedule of Gazette Notification No. 760 expressly states that the forest reserve is constituted for the benefit of the permanent inhabitants of the seven longhouses. In addition, 20 persons are listed as persons that shall have the right to retain possession of rubber and pepper gardens planted prior to the constitution of the forest reserve. From the evidence of PW2, those rights have been inherited by the plaintiffs.

[39] The rights as stated in paras. (a), (b) and (c) of the Second Schedule are generally, for the inhabitants to take forest produce; to hunt game and catch fish and to continue the exercise of rights over *temuda* already acquired prior to the constitution of the forest reserve, respectively.

[40] There was clear evidence before the learned judge that the encroachment and the logging activities of the timber companies have destroyed the plaintiffs' sources of livelihood, the destruction of their rubber gardens, farmland, old settlement sites with orchard gardens, burial grounds and sacred sites, valuable trees and that the encroachment and logging activities had caused erosion to the plaintiffs' land and polluted their rivers.

[41] The learned judge considered the case of *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555 where this court expressed agreement with the trial judge's decision in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 that native customary rights claim should not be extended to areas where "they used to roam to forage for their livelihood in accordance with their

tradition". This court in *Nor Anak Nyawai (supra)*, stated that "such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food". A

[42] Her Ladyship went on to cite the following statements of this court in *Nor Anak Nyawai (supra)*: B

> On the basis that the Disputed Area was covered with jungles in 1951, with no evidence of 'temuda' or 'pulau' or 'pemakai menoa' having been credibly established, in the circumstances of this case under appeals, the claim for the area to be under native customary rights is a non-starter. And it follows that the issues of which statute is applicable or whether the area was abandoned do not arise. Having said that we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available. C

[43] The learned judge concluded thus:

> The above-quoted passages from the Court of Appeal's judgment therefore show that there is no outright rejection, nor should it be, of the establishment of plaintiffs' native customary rights by foraging for food in the jungle. Although it is indeed logical that there be limit to the area where the foraging should be recognised as establishing native customary rights, but in this case, that the limit has been set by the constitution of the Bukit Bediri Forest Reserve and in the proposal to proclaim the Stika Forest as a Communal Forest. The documents in proof of these, ie Gazette Notification No. 760 and the Proposed Proclamation, both tendered by the defendants themselves, are the express and implied acknowledgement of the plaintiffs' native customary rights over the two Forests. D E F
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> In the face of these written documents, I see no necessity to refer to the evidence of the aerial photographs to resolve the plaintiffs' claim of native customary rights over the two Forests and is also the reason why I chose not to dwell at length on the testimonies of the witnesses at the trial.

[44] We found that the learned judge was correct in concluding that there was no outright rejection by this court of the establishment of plaintiffs' native customary rights by foraging for food in the jungle. Indeed, that position is borne out by the statement of this court in *Nor Anak Nyawai (supra)* that "this case should not necessarily be a precedent for other potential claims where proof may be readily available". G H

[45] In any event, paras. (a) and (b) of the Second Schedule of the Gazette Notification No. 760 clearly provide for the plaintiffs to take timber etc., and to hunt game and catch fish in the forest reserve, which in our judgment, is consistent with the plaintiffs' custom of *pulau* and *pemakai menoa* as explained by the Federal Court in *Bisi Jinggot (supra)*. We therefore found no appealable error on the part of the learned judge in making the first order as set out in para. [26] above. I

[46] In respect of trespass or encroachment by the rail line, we similarly found no appealable error on the part of the learned judge in her finding that the rail line had been built right across Stika Forest and had traversed part of the Bukit Bediri Forest Reserve. We agreed with the learned judge's finding that notwithstanding that the rail line was built over swampy lands, the encroachment had interfered with the plaintiffs' livelihood as the plaintiffs could still carry out activities on and derived benefits from the swampy land.

[47] PW1 and PW2 gave evidence that the encroachment and the logging activities had destroyed the plaintiffs' livelihood through, *inter alia*, the destruction of their rubber gardens, farmland and the clearing of forest areas which are their source of wild game, fishes and timber. We opined, it makes sense that the same destruction would ensue arising from the construction of the rail line.

[48] The point raised by the State Government that since the rail line had been approved by the Director of Forests, there could not be a case of trespass, had been considered by the learned judge. In dealing with the issue which was then raised by the timber companies, Her Ladyship stated thus:

> Ms. Esther Wong in her written submission also said her clients' construction of the rail line being approved by the Director of Forests, they have therefore not committed any actionable wrong. In answer to this submission, I would just refer to three things. First, the timber licence granted to her client appearing at pages 1-33 of their Bundle of Documents Ex D1 and more specifically to clause 28 thereof which they themselves highlighted in green, provides that it is **"granted subject to the native and other rights specified in section 65, of the Forest Ordinance"** (emphasis added). Section 65 allows the felling of timber (other than in a forest reserve) for domestic use. Secondly, it is in her submission that the working plan and a plan for road access or rails were submitted by her clients to the Forest Department for approval … Lastly, a locality map was also attached to the timber licence. What I can deduce from these collective facts and the only logical inference to be made from them is that the timber companies were aware right from the start that their licence is subject to native right and when they submitted the plan for the rail line, it was traversing *(sic)* the two Forests.
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> By submitting such a plan, the timber companies therefore cannot deny liability of wrongdoing against the plaintiffs. Similarly by approving that plan, the Director of Forests (and the Government of Sarawak) is conjointly liable to the plaintiffs who did not receive compensation for the construction of the rail line. As for those who did receive compensation, ie the villagers from Kampung Stika it would only be fair that they be excluded from receiving such payment of damages.

[49] We agreed with the learned judge on the above findings. Clause 28 of the timber licence No. T/5090 (record of appeal vol. II: p. 352) states that:

> This licence is granted subject to the native and other rights specified in section 65, of the Forests Ordinance, to all mining rights and rights in connexion therewith now existing or hereafter created and to all other lawful rights now existing.

[50] Further, apart from the fact that approval was given for the construction of the rail line, there is no other evidence adduced to show that pursuant to the approval, the Director of Forests had issued any direction or order that the exercise of the plaintiffs' subsisting rights be limited. In other words, there is no evidence to show that upon the issuance of the timber licence and/or the approval of the rail line, the rights of the seven longhouses and the 20 persons are subject to any other conditions imposed by the Director of Forests apart from the conditions already expressed in the Second Schedule of Gazette Notification No. 760.

[51] Hence, in our view, the plaintiffs would still enjoy their subsisting rights over the native customary lands *vide* the Gazette Notification No. 760 as claimed ie, to collect jungle produce from the forests, to hunt and to catch fish in the area where the rail line was constructed, so much as it traversed the forest reserves.

Conclusion

[52] For the above reasons, we were unanimous in our view that there was no merit in the appeal. The appeal was accordingly dismissed and the order of the High Court was affirmed.